No. 91-1526

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

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FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

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On Petition For A Writ of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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BRIEF OF AMICUS CURIAE FEMINISTS FOR FREE EXPRESSION IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS

Feminists for Free Expression (FFE) is an organization of women who initially came together in January, 1992 in opposition to Senate Bill 1521, the "Pornography Victims' Compensation Act." It has since grown into a diverse organization of feminist women who share a commitment to preserving the individual's right and responsibility to read, view, and produce media materials of her or his choice, without the intervention of the government "for our own good."

FFE gained national recognition for its initial effort, a letter to the Senate Judiciary Committee protesting the third party liability provisions of S. 1521, which would allow crime victims to seek unlimited money damages from the producer or distributor of a book, magazine, or

film that victims believe to have caused the crime that harmed them. The FFE letter was signed by over 200 prominent women authors, activists, attorneys and scholars including Betty Friedan, Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume. (The text of this letter with a complete list of signatories is reproduced as Appendix A.)

Signatories of the FFE letter included several artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has recently been deemed the "most censored author in America"; Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has likewise drawn fire; Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants were improperly denied for political reasons, as a federal court recently concluded in an exceptional decision ordering that their grants be restored.

As these artists and authors can attest, feminist expression is inherently controversial. Just as some would scapegoat erotic speech generally for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and "the decline of family values."[1] Indeed, any written or visual work which deals frankly with women's lives and sexuality is at risk in a climate of pervasive censorship.[2] Because the freedom to put forth those ideas and to combat ignorance regarding

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[1] In what was hopefully the nadir of this scapegoating of women, for example, responsibility for the riots in Los Angeles was ascribed to television character Murphy Brown; her fictional portrayal of single motherhood was deemed to purvey the "unacceptable lifestyle" that happens to be shared by millions of American women.

[2] Works which have been officially or unofficially censored over the past few years, and which are threatened either directly or by the chilling effect of draconian censorship schemes like RICO forfeiture, include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's *1984*, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. *See* Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (Freedom to Read Foundation 1991).

sexuality is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship initiatives, especially those like RICO forfeiture which would decimate First Amendment protections for all Americans.

FFE opposes the government's use of this chilling and unconstitutional RICO forfeiture scheme in obscenity cases for the same reasons its members organized to oppose S. 1521. As the facts of this case vividly illustrate, RICO forfeiture is far worse than "book-burning by bankruptcy" (as FFE characterized the portended effect of S. 1521) -- it has enabled the government to stage an actual book-burning the likes of which this country has not seen in the two centuries since the Bill of Rights was ratified.

Because this particular censorial forfeiture flagrantly violates the First Amendment, because it sets such a dangerous precedent whereby government could stifle any disfavored speaker, bookstore or newspaper for even a single instance of unprotected speech,

and because feminist speech is especially vulnerable to the same censorial pressures, FFE submits this brief as *amicus curiae* to urge this Court to reject this pretext for censorship in the most unequivocal terms.

ARGUMENT

I. RICO FORFEITURES GRANT GOVERNMENT AN ASTONISHING AND BLATANTLY UNCONSTITUTIONAL LIFE-AND-DEATH POWER OVER MEDIA BUSINESSES.

Feminists including FFE oppose the use of RICO forfeitures in obscenity cases, first and foremost simply as concerned American citizens. This draconian censorship scheme, whereby the government would arrogate the power of life and death over any communicative business it can convict of an obscenity offense, renders First Amendment freedoms insecure to an extent unprecedented in modern memory. If sustained, it would obliterate the well-established constitutional doctrines which until now have always been thought to prevent such free-wheeling censorship as has already occurred in this case.

By direct prosecutorial action and by chilling effect, federal RICO prosecution (and the countless state and local actions this precedent would encourage) would soon reduce the availability of materials dealing with sexuality to the vanishing point. The same limitless

governmental power applied in the context of other speech offenses would confine the entirety of discourse in this society to only that which is safe and uncontroversial.

Thus in its essence, this case has little to do with "obscenity." Rather, because of the unparalleled power this RICO forfeiture law gives government to censor *protected expression*, this case raises the essential question whether the First Amendment limits that power in any meaningful way. The government's theory that there is no such limit represents a cynical attempt to gain this Court's carte blanche approval for the complete suppression of material dealing with sexual themes, under the transparent guise of prosecuting obscenity *qua* "racketeering."

The history of the past few years certainly cautions against acceding to the government's implicit assurances that we can simply "trust them" with this limitless grant of power over the future of free expression in this country. Over the past few years, almost every passing week has brought a new threat of censorship.

The American Library Association's Office for Intellectual Freedom has reported that by 1989, book-banning had increased to three times the level of 1979.[3]

Although many recent instances of censorship may be attributed to private pressure groups or local officials (who indeed would be turned loose to censor at will by the precedent of RICO forfeiture), the federal government in particular has been in the forefront of the current campaign against sexual expression. Political pressures have adversely affected the integrity of the National Endowment of the Arts grant procedures, for example, with the result that feminist artists Holly Hughes and Karen Finley were defunded for strictly ideological reasons, a decision recently reversed in *Finley v. National Endowment for the Arts*, ___ F. Supp. ___, 1992 WL 130854 (C.D. Cal. 1992).

Even more dramatic have been the Justice Department's openly avowed attempts to stifle *protected sexual speech* by means of oppressive anti-

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[3] Pally, *supra* n. 2, at 5.

obscenity measures such as RICO forfeitures and multiple simultaneous indictments. Because of the government's demonstrable illicit intent to censor protected speech, not one but *three* federal courts have enjoined these stratagems. *See, e.g., PHE, Inc. v. U.S. Department of Justice*, 743 F. Supp. 15 (D.D.C. 1990)(enjoining multiple-district prosecutions upon a showing of governmental bad faith, including extortionate demands that plaintiffs cease distributing any sexually oriented material featuring "mere nudity" and other materials the government acknowledged to be protected by the First Amendment).

If this campaign against protected erotic expression were fueled by this Court's approval of RICO forfeitures, it would soon know no bounds. Nor would there remain any constitutional limitation on the power of federal, state or local officials to censor *any* sort of disfavored expression -- certain to include feminist ideas -- by means of the most death-dealing penalties for an endless list of speech-based crimes. Unfortunately, the long and inglorious

history of censorship in this country includes the suppression of literature such as *Ulysses* and *Lady Chatterly's Lover,* now recognized as classics but then condemned for their sexual themes, and the jailing of Margaret Sanger for disseminating information about birth control. *See* Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society*, 33 Wm. & Mary L. Rev. 741 (1992). This history does not breed such confidence in government at any level that Americans should feel comfortable writing a blank check of censorial power. Yet that is precisely the power the use of RICO forfeiture in obscenity cases represents, and unless it is stricken, no speaker or media business including the broadcast networks and major newspapers will be safe from politically-motivated suppression.[4]

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[4] In *Harmelin v. Michigan*, ___ U.S.___, 111 S. Ct. 2680, 2697 n. 11 (1991), Justice Scalia observed:

> "We do not in principle oppose the 'parade of horribles' form of argumentation, . . . but its strength is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil

The first court to decide the RICO forfeiture issue, the Indiana Court of Appeals in *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985), *rev'd* 504 N.E.2d 559 (Ind. 1986), *rev'd sub nom. Fort Wayne Books, Inc. v. Indiana,* 489 U.S. 46 (1989),

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> represented by the imagined parade, and (2) the probability that the parade will in fact materialize."

On this basis, he rejected the argument that if the Court did not conduct proportionality review under the Eighth Amendment, "legislatures could 'mak[e] overtime parking a felony punishable by life imprisonment.'" *Id.*

In this case, however, there can be no doubt that "[p]rior restraints . . . strike to the core of the Framers' concerns," as Justice O'Connor observed in *Minneapolis Star & Tribune v. Minnesota Com'r of Revenue*, 460 U.S. 575, 583 n.6 (1983). And if, arguably, the overtime parking example strains credulity, it does so in a way that the government's potential uses of forfeiture and comparable remedies to silence disfavored speakers do not. Unfortunately, despite the First Amendment, our nation's history is marred with instances of censorship, including many in the past few years. *See* Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society -- From Anthony Comstock to 2 Live Crew*, 33 Wm & Mary L. Rev. 741 (Spring 1992), The tendency of power to corrupt, and the fact that First Amendment freedoms "are delicate and vulnerable," as this Court noted in *NAACP v. Button*, 371 U.S. 415, 433 (1963), cautions against writing government a blank check of censorial authority.

emphatically rejected the notion that the state could forfeit or close entire media businesses for obscenity offenses, on numerous grounds including the fact that forfeiture operated as a classic prior restraint under *Near v. Minnesota*, 283 U.S. 697 (1931). In reaching this conclusion, the court stressed the vital First Amendment policy concerns which should also lead this Court to swiftly reject RICO forfeitures for obscenity:

> "[RICO] statutes as applied to the predicate offense of obscenity inherently lend themselves to constitutional abuses both flagrant and insidious. . . . [P]rosecutors may employ the [RICO] provisions to padlock and seize the contents of one bookstore after another until by direct application of chilling effect, the state has entirely eradicated such establishments. Between the first such closure and the last we can draw no meaningful distinction.
>
> "Moreover, the very 'neutrality' which the state claims for the impact of [RICO forfeitures] enhances the potential for their abuse. In the guise of a telling argument, the state concedes that the obscenity of the seized inventories of books, magazines and films is irrelevant and need not even be alleged. This argument . . . reveals the deeply-flawed nature of [RICO forfeiture] as a response to obscenity. May

> *avant-garde* booksellers and theaters be padlocked and forfeited to the state upon a showing that alongside literary, political, and cinematic classics, they have twice disseminated controversial works subsequently adjudged to be obscene? . . . [T]he guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters." 479 N.E.2d at 601.

As the first court to consider this question observed so forcefully, deploying RICO forfeiture in obscenity cases is a frightening abuse of governmental power. If this Court does not sternly reject this unprecedented scheme of prior restraint, inescapably it will open a Pandora's Box of untrammelled censorship.

At stake here are the most fundamental of First Amendment concerns, which become critically important whenever the government would move to so broaden its power over the availability of officially-disapproved speech. As Marcia Pally has eloquently stated the problem in *Sense and Censorship: The Vanity of Bonfires, supra* n.2, at 9-10:

> "When the state . . . restricts books, movies and music from the public, the nation loses the right and gradually the

ability to make up its mind about the information and entertainment it sees and hears, about the ideas it encounters now and what will be available for future use.

"Historian Henry Steele Commager wrote, 'Censorship . . . creates the kind of society incapable of exercising real discretion. . .. It will create a generation incapable of appreciating the difference between independence of thought and subservience.'

"[O]nce a nation surrenders the right to choose its books, music, and films, it has given away the right to mosey around in art, popular entertainment, and 'trash.' Some may argue that pornography and rock and roll are worthless and can well be done without. Others may say the same of detective novels, horoscope charts or fashion magazines. The idea behind the [First Amendment] is that one makes that determination for oneself."

The government's use and defense of RICO forfeitures in this case puts those First Amendment values in the gravest jeopardy, and must be rejected as the most patently unconstitutional, overbroad, and chilling restraint ever attempted in modern history.

II. EVEN IF THE CENSORIAL EFFECTS OF RICO FORFEITURE WERE LIMITED TO SEXUAL SPEECH, THIS LAW WOULD STILL FUNDAMENTALLY UNDERMINE FIRST AMENDMENT PROTECTION AND ADVERSELY AFFECT THE RIGHTS OF WOMEN.

At one level, the government's actions in this case have implications for First Amendment doctrine far beyond questions of "obscenity." At another level, however, this case very much concerns sexual speech, and as noted above the government has been forthright about its desires to suppress protected erotic expression.[5] Even if the import of this case were limited to the question of pornography, many women and feminists would oppose RICO forfeiture as a disastrously harmful measure adverse to their interests.

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[5] In addition to this statute's patent overbreadth and unconstitutionality as a prior restraint, the government's overtly censorial motive represents yet another independent basis for striking down the RICO Act as applied to obscenity. As Professor Tribe has suggested, a law like RICO forfeiture should be deemed facially discriminatory because the circumstances manifest an "evident pattern of official action that a reasonably well-informed observer would interpret as suppressing a particular point of view." *American Constitutional Law* 820 (2d ed. 1988).

There is by no means a monolith of opinion among women or feminists regarding the harmfulness of pornography, and much less regarding the desirability of censoring it. Many women believe strongly that the suppression of sexual material will do women more harm than good, because it diverts attention away from the real sources of our problems and will inevitably result in the wide suppression of information about sexuality and reproduction so vital to women's well-being.

For these reasons, FFE was not the only women's organization to oppose S. 1521 -- several state chapters of the National Organization for Women, including those of Vermont, Michigan, New York, California, and Alabama, also expressed their opposition to the Senate Judiciary Committee. As censorship initiatives have increasingly targeted the works of artists like Robert Mapplethorpe, Holly Hughes and Karen Finley, the debate within the feminist movement has swung away from enthusiasm for such censorial laws. Recently, feminists like Betty Friedan have focused on the

connection between sexually-repressive censorship and the backlash against women in these economically troubled times. *See "Playboy Interview: Betty Friedan,"* Playboy (September 1992).[6]

And indeed, such enthusiasm for censorship as may once have existed among some feminists was never so pervasive as the press coverage devoted to the Catharine MacKinnon/Andrea Dworkin movement has often implied. In the mid-1980's, important feminist works opposing their censorship initiatives appeared, such as the collection of essays in Varda Burstyn, ed., *Women Against Censorship* (1985), and the Feminist Anti-Censorship Task Force's similar series of essays, pointedly illustrated with erotic depictions. in *Caught Looking: Feminism, Pornography, and*

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[6] The appearance of this timely and important interview with one of the "Founding Mothers" of the women's movement highlights once again the fact that feminists rely upon freedom of the press in sexual matters in order to have fora for the expression of feminist ideas. We feminists like many others may read this issue of *Playboy* "only for the interviews," but the fact remains that without such sexually oriented publications, discourse regarding sexuality and gender issues in our culture would be much impoverished.

Censorship (1986). FACT's scholarly amicus brief in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), was instrumental in the court's formulation of and response to the complex First Amendment issues the Dworkin-MacKinnon ordinance raised, and the rejection of that law as impossibly vague and viewpoint-discriminatory. *See* Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., in American Booksellers Association v. Hudnut*, 21 J. of Law Reform 69 (1988)(hereinafter, "FACT Brief"). (For a selected bibliography of works pertaining to feminist opposition to censorship, see Appendix B.)

Women, including many feminists, have consistently opposed censorship in general and the suppression of pornography in particular for a number of reasons. Although some pornography contains negative imagery that feminists would certainly criticize, it also contains numerous positive images. Feminists defending free speech on sexual subjects have observed, for example, that pornography "may convey the

message that sexuality need not be tied to reproduction, men, or domesticity." FACT Brief, *supra*, at 30. Feminists have also noted that "there is a broad consensus among those who have studied it that much sexually explicit speech that is commonly labeled 'pornography' serves a variety of positive purposes," such as the treatment of sexual dysfunction, as even the Meese Commission acknowledged. Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. Rev. 201, 205 (1987). Many couples and individuals use erotic materials as an aphrodisiac, or to improve their sex lives. *Id.*

In short, the materials suppressed in this case, and many others which would inevitably suffer the next blows of censorship if this Court were to uphold RICO forfeiture, are of value and interest to women. Indeed, video store marketing statistics reveal for example that by 1989, close to half of adult videotapes

were rented by women either alone or in couples.[7]

Thus many feminist artists, writers and attorneys have opposed censorship, believing both that blaming sexual materials for social problems distracts the nation from the *actual* sources of gender bias and violence, and that censoring those materials establishes dangerous precedents for suppressing women's speech and other speech of serious interest to women.

A. Sexually Oriented Depictions And Literature Do Not Cause Violence Against Women.

Based on the overwhelming weight of scientific research both in the United States and abroad, FFE rejects the premise that sexual materials "cause" violence against women. Rather, FFE believes that targeting words and images as the alleged cause of violence and sexism entails a double harm: it tends to exculpate those who in fact behave in a violent or sexist manner, and it more broadly diverts

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[7] *See* Pally, *supra* n. 2, at 67.

needed attention and resources from the true underlying causes of those ills.

Violence against women and male-dominated social institutions certainly flourished long before the availability of pornography as we know it, long before the advent of the printing press or motion pictures. They flourish today in countries like Iran, Saudi Arabia and China, where no sexual material or even Western music is permitted. Abolishing erotic words and pictures will no more cure the ills misguidedly ascribed to them than the similar scapegoating of "witches" in Europe and Colonial America meaningfully addressed the problems of those times.

Despite many attempts to do so, this Court has never been persuaded that erotic materials cause any tangible harms. In *Stanley v. Georgia*, 394 U.S. 557, 566 (1969), for example, this Court upheld the right of adults to possess even "obscene" materials in the privacy of their own homes, noting:

> "Georgia asserts that exposure to obscene materials may lead to deviant sexual behav-

> for or crimes of sexual violence. There appears to be little empirical basis for that assertion."

See also Osborne v. Ohio, 495 U.S. 103, 109-110 (1990).

Shortly after the decision in *Stanley*, the 1970 President's Commission on Obscenity and Pornography concluded its extensive studies of the relationship between sexually explicit behavior and anti-social behavior. The 1970 Commission concluded: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior." 1970 Report of the President-'s Commission on Obscenity and Pornography at 139. That conclusion regarding erotic materials and violence has since been repeated by every reputable American study of the subject, and by a number of studies conducted in other countries.

Dr. John Money, director of the Psycho-hormonal Research Unit at Johns Hopkins University School of medicine, is considered by

many to be the world's leading expert on the subject. In his 1989 book *Vandalized Lovemaps*, he concludes that the derailed sexual impulses of rapists, child abusers, exhibitionists and the like result from childhood traumas; his research has yielded no evidence that sexually explicit material causes sexual crimes or aberrations. As Dr. Money stated his conclusions in the *American Journal of Psychotherapy*: "The fantasies of paraphilia are not socially contagious. They are not preferences borrowed from movies, books, or other people."[8]

Dr. Money also found that people with unusual or criminal sexualities were raised with strict anti-sexual, repressive attitudes. He observed in a *New York Times* interview that the "current repressive attitudes toward sex will breed an . . . epidemic of aberrant sexual behavior." *Scientists Trace Aberrant Sexuality*, New York Times, January 23, 1990.

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[8] *Paraphilias: Phenomenology and Classification*, 38 American Journal of Psychotherapy at 175 (1984).

Leading researchers Drs. Edward Donnerstein, Daniel Linz and Steven Penrod have likewise found no causal link between pornography and violence or other anti-social behavior; they attribute the aggressive effects of exposure to violent pornography in their laboratory experiments to the *violent* content of the images, not the sexual content. They wrote in *The Question of Pornography: Research Findings and Policy Implications* 172 (1987):

> "Should harsher penalties be leveled against persons who traffic in pornography? We do not believe so. Rather, it is our opinion that the most prudent course of action would be the development of educational programs that would teach viewers to become more critical consumers of the mass media. . . . [S]tricter obscenity laws are . . . more restrictive of personal freedoms than an educational approach. And, as we have noted, the existing research does not justify this approach."

Studies undertaken in other countries have also disavowed the conclusion that erotica causes social harms. In 1985, the University of Copenhagen's Institute of Criminal Science reported that in European countries where restrictions on sexually explicit materials have

been lifted, the incidence of violent sex crimes over the last twenty years has declined or remained constant.[9]

Neither the Canadian nor the British Commissions on pornography have found any link between sexual material and sex crimes. As the British Inquiry into Obscenity and Film Censorship wrote: "We unhesitatingly reject the suggestion that the available statistical information for England and Wales lends any support at all to the argument that pornography acts as a stimulus to the commission of sexual violence."[10] The Canadian Department of Justice issued a similar report in 1986, known as the Fraser Report, which concluded: "There is no persuasive evidence that the viewing of pornography causes harm to the average adult, . . . that exposure causes the average adult to harm others, . . . that exposure causes the

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[9] Berl Kutchinsky, *Pornography and Its Effect in Denmark and the United States: A Rejoinder and Beyond*, in Comparative Social Research: An Annual, 1985.

[10] *Report of the British Inquiry into Obscenity and Film Censorship* (Williams Committee) at 80 (1979).

average adult to alter established sex practices."[11]

In short, there was simply no respectable scientific support for the Meese Commission's anecdotally-based conclusions, cloaked in "feminist" terms, that virtually all pornography is "degrading" to women and that this "degrading" material causes violence or other harms. The Meese Commission's own expert, Dr. Edna Einsiedel of the University of Calgary, wrote an independent review of the social science literature, and also found no causal link between pornography and sex crimes. The Meese Commission then turned to Surgeon General C. E. Koop and asked him to gather additional data. Koop conducted a conference of researchers and practitioners in the medical and psychological fields; his report also found no causal

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[11] The Canadian Department of Justice, *The Impact of Pornography: An Analysis of Research and Summary Findings* (Fraser Report), Working Papers on Pornography and Prostitution, Report No. 13 (1986) at p. 94.

relationship between sexual material and violence.[12]

Two commissioners, Ellen Levine and Dr. Judith Becker, so disagreed with the Meese Commission's *Final Report* that they issued a dissenting report castigating the commission for the "paucity of certain types of testimony, including dissenting expert opinion." *Dissenting Report* at 4. They concluded: "No self-respecting investigator would accept conclusions based on such a study." *Id.* at 7. Dr. Becker, director of the Sexual Behavior Clinic at New York State Psychiatric Institute, told *The New York Times* (May 1, 1986): "I've been working with sex offenders for ten years and have reviewed the scientific literature, and I don't think a causal link exists between pornography and sex crimes."

Both women in particular and the quality of life in our society generally will suffer from censorship premised on the misguided notion that words and images are a significant cause of

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[12] *See* Pally, *supra* n. 2, at 21.

violence and other social ills. First, such an approach diverts attention and precious resources away from the real underlying causes of violence. There is simply no reason to believe that erotica causes rape, any more than Murphy Brown's blessed event caused the Los Angeles riots. No matter how many "dirty pictures" or record lyrics are suppressed, unemployment, alcoholism, and the gender bias which pervades our society will continue to result in violence against women. Meanwhile, censorship becomes an ineffectual substitute for building shelters for abused women and other constructive measures. Inevitably, it will be turned against women who express controversial views as well as stifling the availability of information crucial to women's lives and health.

B. Women Need Freedom of Discussion Regarding Sexuality, and That Freedom Is Indivisible From Others' Freedom of Expression On Sexual Themes.

Ignorance and prejudice regarding women's sexuality is a dangerous and constant threat to women in very tangible ways. The current

passion for censorship and suppression of anything anyone might find "offensive" has already exacted deadly costs by impeding education efforts regarding the AIDS epidemic. Silence about sex and reproductive issues are extremely detrimental to women's quality of life and well-being; yet such silence will again become the norm if censorial laws of RICO's magnitude are allowed to stand.

The notorious difficulties lesbian mothers have faced in retaining custody of their children is a prime example of the effects of sexual ignorance and prejudice, but by no means an isolated one. Recently, for example, a young single mother in Otisco, New York was arrested and her infant daughter taken from her by welfare officials after she related to a social worker that she experienced feelings of sexual arousal while nursing the baby.[13] She did not

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[13] Of course, as medical studies reveal, a physiological sexual response to nursing is completely normal. *See* Janice M. Riordan and Emily T. Rapp, *Pleasure and Purpose: The Sensuousness of Breastfeeding*, Journal of Obstetrical and Gynocological Neonatal Nursing (March/April 1980).

regain custody of her daughter for over a year. Esther Davidowitz, *The Breast-Feeding Taboo*, Redbook (July 1992), at 92.

History gives women every cause to suspect censorship in the name of "preserving the family" and enhancing women's safety. History teaches that censorial campaigns have been directed prominently if not primarily against those who advance ideas considered radical at the time; and notable examples for feminists include the imprisonment of Margaret Sanger for dispensing birth control information. Nor has that tendency abated in modern times; witness the obscenity trial of the Cincinnati Contemporary Arts Center and its director for daring to exhibit the controversial images of Robert Mapplethorpe's photographic genius, and the attempted defunding of the feminist work of Holly Hughes and Karen Finley.

To the extent that misogynist sexual speech offends women or others, the constitutionally acceptable answer is more and better counter-speech. FFE believes that there are positive

alternatives to censorship, alternatives which can enhance rather than negate constitutional liberties: such as combatting negative, alienating attitudes by educating media consumers to make critical choices, and creating more cinematic and literary treatments of sexuality from women's point of view.

The censorship alternative can only return our culture to darkness in matters of sexuality, reproduction, and gender role issues. In any such suppressive climate, women lose access to information about sex and about reproductive choice, whether by direct censorship or chilling effect.

Feminist expression on these topics was certainly viewed as incendiary and harmful when the women's movement began 25 years ago, and in large areas of the country it still is under attack. Because it is so controversial, feminist speech is particularly vulnerable to the sort of pressures brought to bear on distributors and producers by a statute like the RICO forfeiture scheme.

C. Not Only Is RICO Forfeiture In Obscenity Cases Egregiously Unconstitutional On Its Face; Such Forfeitures Are Also Invalid As A Censorial Tool In The Government's Avowed Campaign To Censor Protected Erotic Expression.

The Justice Department has been engaged in an ever-widening campaign to eliminate all sexual expression from the marketplace, conducting a moral crusade unknown since the days of Anthony Comstock. RICO forfeitures are but one strategy among many the Justice Department has used in the past few years in its admitted efforts to suppress even *nonobscene* erotic speech.

This campaign began in earnest when the Attorney General's Commission on Pornography ("Meese Commission") was chartered to devise "more effective ways in which the spread of pornography could be contained."[14] For approximately a decade prior to 1986, when the Meese Commission issued its *Final Report*, the fed-

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[14] *See Playboy Enterprises, Inc. v. Meese,* 639 F.Supp. 581, 583 (D.D.C. 1986). The Meese Commission's Charter added, rather oxymoronically, that the commission should accomplish this censorial goal in a manner "consistent with constitutional guarantees."

eral anti-obscenity laws had gone virtually unenforced.[15] During that period, sexually oriented entertainment had soared in popularity with the advent of the VCR medium. Ironically, these materials' vast popularity with the American public seemed to fuel the government's determination to suppress them.

Even before the Meese Commission published its *Final Report*, the publishers of *Playboy* and *Penthouse* magazines were compelled to bring suit to curtail its efforts to suppress nonobscene materials. In *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986), the court sharply condemned the Commission's actions in communicating a threat to major distributors of those magazines that the Commission's *Final Report* would publically brand them as "distributors of por-

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[15] *See* Attorney General's Commission on Pornography, *Final Report* at 367: "From January 1, 1978, to February 27, 1986, a total of only one hundred individuals were indicted for violation of the federal obscenity laws." Even this low figure is deceptive, as the federal government had virtually ceased to bring any obscenity cases based on mainstream adult materials of the sort involved in this case.

nography." Convenience stores had removed the magazines from their shelves as a result.[16] The court required the Commission to retract its remarks in the letter sent to the distributors, some of which had already withdrawn the plaintiff's magazines from circulation. 639 F. Supp. at 583-584, 588. Under *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the court held, the Commission had engaged in impermissible informal censorship: "the effect of what the defendants have done amounts to a prior administrative restraint of material which even the defendants appear to concede is constitutionally protected matter."

The Meese Commission's *Final Report* accordingly did not blacklist "distributors of pornography," but it did prominently advocate

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[16] If booksellers moved to drop such mainstream materials as *Playboy* in response to this relatively minor threat, how much more chilling a threat backed up by RICO forfeiture would be. The self-censorship which would flow from the use of forfeitures for obscenity violations is undeniable, and FFE fears that much protected material by and about women and about sexuality will be dropped from distribution in the shadow of this threat.

the use of RICO or other blanket forfeitures for obscenity offenses as a means to "efficiently suppress the evils of obscenity." Complaining that ordinary obscenity prosecutions were inadequate to the task of stemming the American public's enthusiastic consumption of adult entertainment, the Meese Commission advocated blanket forfeitures as "an effective means to substantially eliminate" businesses that disseminate erotica. *Final Report* at 464.

The Meese Commission directly spawned a new cadre of professional censors, the National Obscenity Enforcement Unit (NOEU), which Attorney General Meese created in February 1987.[17] The Unit has increased in size and aggressiveness with every passing year. The federal courts have repeatedly been required to

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[17] Recently re-named the Child Exploitation and Obscenity Section, the unit focuses its efforts almost entirely on materials depicting only adults and intended for distribution only to willing adults, as in this case. In any event, its censorial activities cannot be justified by reference to the noble aspiration of "protecting children" any more than a similar mandate could save the censorial activities of the state commission in *Bantam Books*.

curtail its censorial activities, transparently designed to suppress protected media materials.

A few months after the Attorney General created the NOEU, the Justice Department changed its policy to encourage multiple-district obscenity prosecutions. In September 1987, a policy statement in the *U.S. Attorney's Manual*, which had previously prohibited such onerous prosecutions, was replaced with an exhortation that multiple prosecutions were "*encouraged* . . . where the size of the [defendant's] organizational structure suggests that a multiple district approach will be most effective." *U.S. Attorney's Manual* § 9-75.310 (October 1, 1988). In public statements, Justice Department officials made clear that "most effective" meant the surest method of forcing distributors of erotic speech entirely out of business. Likewise, federal prosecutors have bluntly conceded the Department's aim in using the RICO Act in ob-

scenity cases: "We wanted to do RICOs to wipe out the business."[18]

The NOEU quickly became "a high-voltage prosecution machine," as the *Wall Street Journal* reported, launching "the most aggressive federal attack on pornography in decades."[19]

> "The federal strategy is to threaten two or more criminal trials in quick succession in geographically disparate, and often politically conservative, jurisdictions. Many defendants fold under such pressure, often agreeing to guilty pleas barring them not only from future criminal activity, but also from the sale of any kind of sexually explicit material."[20]

In three separate cases, federal courts have enjoined or dismissed these multiplicitous obscenity prosecutions designed to annihilate businesses engaged in erotic expression. *See Freedberg v. U.S. Department of Justice*, 703 F. Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Department of Justice*, 743

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[18] *American Lawyer*, March 1988, at 98 (quoting NOEU attorney Cynthia Christfield).

[19] Barrett, *Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far From Their Home Bases*, The Wall Street Journal, July 27, 1990, at A1.

[20] Id.

F. Supp. 15 (D.D.C. 1990); *United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992). Nonetheless, the government managed to use this tactic to obliterate several businesses, including the successful plaintiff in *Freedberg*.

Extolling a plea agreement he extracted from a defendant who faced four separate obscenity trials scheduled within seven weeks, and who "signed away [his] rights to do any business with sexually explicit material" under this coercive pressure, NOEU Director Patrick Trueman explained:

> " 'We don't want to have to re-prove obscenity in a new trial against the [defendants], so under the agreement all we would have to show is that they were back in the "sexually explicit" business. . . . [The defendant's attorney] says these guys are forfeiting First Amendment rights. That's correct; they are. The reason is that they're criminals, and they can't be trusted.' " [21]

Trueman has recently "credited his squad with reducing the size of the pornography business," and warns of more to come:

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[21] Barrett, *supra* n. 17, at A4.

> "To Trueman, whose squad has . . . helped put a half-dozen major producers and distributors . . . out of business, the neighborhood video store is the next likely target.
>
> "'We'll prosecute the video store owner as well as the producer and distributor,' Trueman said. 'You-'ll see that . . . as we announce more and more indictments.'"[22]

Clearly, the government's objective in these overbearing prosecutions has been to eliminate sexual materials from the marketplace. Under the First Amendment, however, the government has no business pursuing this agenda of attempting to purge American culture of sexual speech. Its obvious effort to do so through use of RICO forfeiture, first by direct suppression of targeted defendants and then by virtue of the inestimable chill this law and similar ones in the future would cast over all art and other expression, cannot survive First Amendment scrutiny.

Those who would impose their views on others, whether they advocate censorship to the end of purging public discourse of "indecency"

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[22] *Denver Post*, November 4, 1990.

or of all but the most "politically correct" depictions of sexuality, are disserving the rights and interests of women, and of all Americans. The great soothing appeal of censorship must be rejected, unless we are to fundamentally depart from the tolerance and pluralism enshrined in the First Amendment as enduring values of our society.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression urges this Court to reverse the judgment below.

Respectfully submitted,

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September 2, 1992

APPENDIX A

**FEBRUARY 14, 1992 LETTER
FROM FEMINISTS FOR FREE EXPRESSION
TO THE SENATE JUDICIARY COMMITTEE,
OPPOSING SENATE BILL 1521**

To the members of the Senate Judiciary Committee:

We the undersigned feminist women, write to oppose the misnamed Pornography Victims' Compensation Act, S. 1521. Supposedly an aid to victims of violent crimes, it scapegoats speech as a substitute for action against violence. Rape, battery, and child molestation are violent crimes that this nation should take every measure to eliminate. But S. 1521 will do crime victims more harm than good.

The premise of S. 1521 -- that violence is "caused" by words and images -- is false. Violence against women and children flourished for thousands of years before the printing press and motion picture, and continues today in countries like Saudi Arabia and Iran, where no commercial sexual material is available. Correlation studies, in this country, Europe and Asia, find *no* rise is sexual violence with the availability of sexual material. No reputable research shows a causal link between "obscenity" or "child pornography" and violence.

S. 1521 damages crime victims by diverting attention away from the substantive triggers to violence. Violence is caused by deeply-rooted, economic, family, psychological and political factors, and it is these that need addressing. Do so and you will gain the confidence and votes of millions of American women and men.

S. 1521 is a logical and legal muddle. It reinforces the "porn made me do it" excuse for rapists and batterers. This country does not accept get-off-the-hook reasoning for other crimes; we should not accept it for crimes most often committed against women. S. 1521 does not

even require a criminal conviction before a victim of violence may sue a bookseller or distributor for supposed causality. Criminals may go free, perhaps to rape again, while booksellers are punished.

Other confusions of S. 1521 present themselves. If a book is judged obscene in Louisville, Kentucky, it can be deemed the cause of a crime. The same book, judged not obscene in the nearby city of Lexington, cannot be the cause of a crime. Further, if Congress is certain that books and videos cause crime, why blame only books or videos on sexual themes? Why not blame the Bible, which scores of people every year cite as justification for abuse and murder? John List, who was discovered by the police two years ago after killing his mother, wife and three children for "religious" reasons, is only one of the more notorious examples.

S. 1521 is book banning by bankruptcy. It will suppress *across the nation* sexual material that may be offensive to some people in some communities. S. 1521 makes it easy to bring frequent suits for unlimited money damages against booksellers, publishers and distributors. Even if material is judged not obscene and not a cause of crime, legal costs will be ruinous to book, art and movie makers.

The most likely outcome of S. 1521 is that crime victims will in no way benefit while producers and distributors are put out of business. And the threat of court suits will create a chilling effect as all those engaged in free speech, in an effort to avoid the risk of liability, self-censor much material that is legal and valuable, and should be available to citizens in a democratic society.

Feminist women are especially keen to the harms of censorship, legislative or monetary. Historically, information about sex, sexual orientation, reproduction and birth control has been banned under the guise of "morality" and

the "protection" of women. Such restrictions have never reduced violence. Instead, they have lead to the jailing of birth control advocate Margaret Sanger, and the suppression of important works, from *Our Bodies, Ourselves* to novels such as *Ulysses*, *The Well of Loneliness* and *Lady Chatterley's Lover*, to the feminist plays of Karen Finley and Holly Hughes.

Women do not require "protection" from explicit sexual materials. It is no goal of feminism to restrict individual choices or stamp out sexual imagery. Though some women and men may have this on their platform, they represent only themselves. Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state "for her own good." We believe genuine feminism encourages individuals to make these choices for themselves. This is the great benefit of being feminists in a free society.

We urge you to give S. 1521 the speedy death it deserves and turn your attention to constructive measures that will reduce violence and bring us all a more just and feminist future.

Sincerely,

(Organizations noted for identification only.)

Betty Friedan

Nora Ephron, author

Mary Gordon, author

Ann Bernays, author

Judy Blume, author

Erica Jong, author

Susan Isaacs, author and sceenwriter

Adrienne Rich, poet

Jamaica Kincaid, author and writer

Katha Pollitt, author, educator and editor

Elizabeth Streb, choreographer, Ringside Company

Catharine Stimpson, professor, Rutgers University

Susan Jacoby, author

Ann Snitow, author, professor, New School for Social Research

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Amy Adler, attorney

Hannah Alderfer, graphic designer

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Lavada Blanton, Archdeaconry Executive
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Berit Branch, performer

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Ellen Carton, executive director, Gay & Lesbian Alliance Against Defamation

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Gayle Cohen, acquisitions, Aires Films Releasing

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Judith Levine, author

Jo List Levinson, co-chair, National Coalition
Against Censorship

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Civil Liberties Union

Bobby Lilly, chairperson, Californians Against
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V. Mark, editor and publisher,
Village Voice Literary Supplement

Del Martin, author

Sue Martin, program coordinator,
Family Violence Prevention Fund

Donna J. McBride, vice president and operating officer, Naiad Press

Carlin Meyer, professor, New York Law School

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Elizabeth Murray, artist

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Isabelle Katz Pinzler, director, Women's Rights Project, ACLU

Nancy Klien Piori, Barnard College

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Sandy Rapp, musician and author; political director, East End Gay Association

Gini Reticker, filmmaker

Catherine Reynolds

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Candida Royalle, American Association of Sex Educators, Counselors & Therapists; Femme Productions, Inc.

Maggie Rubenstein, Ph.D., sexologist and therapist

Gayle Rubin, author and anthropologist

Catherine Saalfield, video maker and journalist

Connie Samaras, artist; professor, U.C. Irvine

Marlene Sanders, television journalist

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Carol Seajay, Feminist Booksellers News

Barbara Shack, chair, New York State
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Vivian Shapiro, vice president, Top Value Media

Catherine Siemann, ACLU

Joy Silverman, National Campaign for
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Barbara Simon, general counsel, Institue for
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Gail Simon, president, Woman Home Video

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Annie Sprinkle, sex educator

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Kat Sunlove, author and performer

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Marcia Tucker, director, New Museum of Contemporary Art

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Ellen Willis, professor of journalism, New York University; Union of Democratic Intellectuals

Martha Wilson, artist and teacher; director, Program in Art, California Institute of the Arts

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APPENDIX B

SELECTED BIBLIOGRAPHY REGARDING WOMEN'S OPPOSITION TO CENSORSHIP OF PORNOGRAPHY

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